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ZSCHIMMER & SCHWARZ GMBH & CO KG CHEMISCHE FABRIKEN v. PERSONS UNKNOWN & ANOR (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
ONG CHEE KWAN JC
[SUIT NO: WA-22NCC-600-12-2020]
B 13 FEBRUARY 2021
[2021] CLJ JT(4)

C ***CIVIL PROCEDURE:*** *Writ and statement of claim – Amendment – Application to add additional defendants to suit – Whether proposed defendants would prejudice existing defendants – Whether application would change nature of suit if allowed – Whether necessary to add proposed defendants as parties to suit – Whether dispute could be completely determined with addition of proposed defendants – Whether proposed defendants closely connected to reliefs and remedies claimed in suit – Rules of Court 2012, O. 15 r. 6(2)*

D ***CIVIL PROCEDURE:*** *Injunction – Proprietary injunction – Application for – Application against proposed defendants – Whether there was serious issue to be tried on merits – Whether balance of convenience in favour of granting injunction – Whether just and convenient to grant injunction*

E ***CIVIL PROCEDURE:*** *Injunction – Mareva freezing injunction – Application for – Application against proposed defendants – Whether there was good arguable case – Whether proposed defendants have assets within jurisdiction – Whether there was risk of assets being removed before judgment could be satisfied*

F ***CIVIL PROCEDURE:*** *Judgments and orders – Self-identification order – Push payment fraud – Plaintiff defrauded by persons unknown – Proprietary and Mareva freezing injunctions obtained against persons unknown – Whether court ought to grant self-identification order – Whether necessary – Whether effective in alerting persons unknown to reveal themselves – Whether applicable in fraud cases*

G ***CIVIL PROCEDURE:*** *Service – Substituted service – Whether defendant likely to be evading service after being aware of suit – Whether personal service impracticable – Whether application for substituted service ought to be allowed – Whether application would prejudice defendant if allowed – Rules of Court 2012, O. 62 r. 5(1)*

H The plaintiff, a manufacturer of speciality chemical products and a victim of a push payment fraud, had obtained (i) proprietary and *Mareva* freezing injunctions against the first and second defendants; and (ii) discovery orders against CIMB Bank Berhad and CIMB Islamic Bank Bhd. According to the plaintiff, (i) the first defendant was a person(s) unknown; (ii) the first defendant, after infiltrating the plaintiff's email communications with its South Korean counterpart, had deceived the plaintiff into making a payment
I of EUR123,014.65 (equivalent to approximately RM600,000) ('plaintiff's monies') into a CIMB bank account in Malaysia; (iii) the plaintiff thought that it was making a genuine payment to its South Korean counterpart when, in actual fact, the plaintiff's monies were credited into the CIMB bank

account of Premier Outlook Services ('POS account'); (iv) the second defendant, the sole signatory in control of the POS account, had caused all of the plaintiff's monies to be paid out into different bank accounts, including his own and the accounts of the proposed third and fourth defendants. To trace and recover the plaintiff's monies, the plaintiff commenced the present applications, seeking (i) to amend the writ and statement of claim to include the proposed third and fourth defendants ('encl. 53'); (ii) for *ex parte* proprietary and *Mareva* freezing injunctions against the proposed third and fourth defendants ('encl. 56'); (iii) a self-identification order, also known as a 'Spartacus' or 'I am Spartacus' order, against the first defendant, being person(s) unknown ('encl. 57'); and (iv) for substituted service of the amended writ and statement of claim, and other cause papers, on the defendant ('encl. 58').

Held (granting encls. 53, 56, 57 and 58):

(1) Order 15 r. 6(2)(b) of the Rules of Court 2012 ('ROC') provides that the court may order (i) any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; and (ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the opinion of the court, would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter. (para 26)

(2) The requirements under O. 15 r. 6(2)(b) of the ROC have been met. The plaintiff made this amendment application *bona fide* and without undue delay after receiving the discovery documents and ascertaining the identities of the proposed third and fourth defendant. It was necessary to add the proposed third and fourth defendants to this suit in order to seek the necessary reliefs to recover the plaintiff's monies. No prejudice was caused to the first and second defendants by this amendment which could not be compensated by costs. This amendment also did not change the nature of this suit. The plaintiff maintained its constructive trust claim against the first and second defendants and extended the same claim to the proposed third and fourth defendants who each received portions of the plaintiff's monies. Furthermore, the proposed third and fourth defendants ought to be added as parties to the suit as they were necessary to ensure that all matters in dispute could be completely determined by the court as the plaintiff claimed that the plaintiff's monies had been wrongfully transferred to the proposed third and fourth defendants. The proposed third and fourth defendants were closely connected to the reliefs and remedies that the plaintiff was claiming in this suit. (paras 28-30)

(3) In *AA v. Persons Unknown*, there were three elements for the grant of a proprietary injunction, namely: (i) the claimant had shown that there was a serious issue to be tried on the merits; (ii) the balance of convenience is in favour of granting an injunction; and (iii) it is just and convenient to grant the injunction. The plaintiff satisfied the grounds for proprietary injunction against the proposed third and fourth defendants. The plaintiff's monies could now be traced to the transfers made to the proposed third and fourth defendants. There were serious issues to be tried and the plaintiff's proprietary interest should be preserved by this proprietary injunction. The balance of convenience was in favour of the grant of the proprietary injunction as there were the plaintiff's monies that were paid out under a false premise and wrongfully transferred to the proposed third and fourth defendants. These monies should be injuncted pending the determination of the full writ action. It was just and convenient to grant the proprietary injunction. (paras 33, 34 & 40-42)

(4) As set out in *Aspatra Sdn Bhd & Ors v. Bank Bumiputra Malaysia Sdn Bhd & Anor*, there are three elements to be fulfilled for the grant of a *Mareva* freezing injunction, namely, (i) the applicant must show that it has a good arguable case; (ii) the defendants have assets within jurisdiction; and (iii) there is a risk of the assets being removed before judgment could be satisfied. The plaintiff satisfied the above elements as (i) there was a good arguable case that the plaintiff had a cause of action against the proposed third and fourth defendants on grounds of knowing receipt and/or dishonest assistance; (ii) as Malaysian citizens with Malaysian residential addresses, the proposed third and fourth defendants were likely to have assets in the jurisdiction personally and/or by virtue of their business; and (iii) the suspicious circumstances in relation to the transfer of the plaintiff's monies to the bank accounts belonging to and/or controlled by the proposed third and fourth defendants disclosed a real risk of dissipation of assets. (paras 43-48)

(5) A self-identification order is an order requiring the person(s) unknown to identify himself/herself and to provide an address for service. The self-identification order would require placement of an advertisement in Berita Harian of a notice against the first defendant, being the person(s) unknown. The notice would alert the person(s) unknown of the order for them to self-identify within seven days of the advertisement and, failing which, they risk committal proceedings. The self-identification order was necessary so that if the plaintiff is successful in its current suit, the plaintiff's proprietary remedies are to be effective against these other person(s) unknown. The plaintiff's monies also appeared to remain within Malaysian bank accounts and Malaysian jurisdiction. Hence, self-identification advertisement in Malaysia could be effective to alert the person(s) unknown to reveal themselves. (paras 57, 61 & 62)

(6) The second defendant had been in contact with the plaintiff's solicitors and was aware of the current proceedings against him. Despite having scheduled multiple appointments with the plaintiff's solicitors for the service of the cause papers, the second defendant failed to turn up on all occasions and told the plaintiff that he had left the State for work. The plaintiff had obtained an order for substituted service on the second defendant. The cause papers were then duly advertised and left at the second defendant's address. To date, more than a month had lapsed since the deemed date of service of the relevant cause papers on the second defendant. However, the second defendant refused to enter appearance or make any form of contact with the plaintiff's solicitors. Given the circumstances, the second defendant was likely to be evading service after being aware of this suit against him. Order 62 r. 5(1) of the ROC provides that the court may make an order for substituted service of a document requiring personal service if personal service is impracticable. The application for substituted service should be allowed as it would be impractical for the plaintiff to effect personal service of the cause papers. The second defendant would not be prejudiced by the substituted service as he already had knowledge of this suit. (paras 64, 66-69 & 71)

Case(s) referred to:

AA v. Persons Unknown [2020] 4 WLR 35 ***(refd)***

Ang Chee Huat v. Thomas Joseph Engelbach [1995] 2 CLJ 893 CA ***(refd)***

Aspatra Sdn Bhd & Ors v. Bank Bumiputra (M) Bhd & Anor [1987] 2 CLJ 377; [1987] CLJ (Rep) 50 SC ***(refd)***

BNP Paribas (aka Banque National De Paris) v. Polynesia Timber Services Pte Ltd [2002] 1 SLR(R) 539 ***(refd)***

CMOC Sales & Marketing Limited v. Persons Unknown and 30 Others [2018] EWHC 2230 ***(refd)***

NPV v. QEL & Another [2018] EWHC 703 ***(refd)***

PML v. Person(s) Unknown [2018] EWHC 838 ***(refd)***

Westdeutsche Landesbank Girozentrale v. Islington London Borough Council [1996] AC 669 ***(refd)***

Yamaha Motor Co Ltd v. Yamaha (M) Sdn Bhd & Ors [1983] 1 CLJ 191; [1983] CLJ (Rep) 428 FC ***(refd)***

Zschimmer & Schwarz GmbH & Co KG Chemische Fabriken v. Persons Unknown & Anor [2021] 7 MLJ 178 ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 15 r. 6(2)(b), O. 20 r. 5, O. 29 r. 1(2A)(a), (b), (c), (d), (g), O. 62 r. 5(1)

For the plaintiff - Lee Shih & Pang Huey Lynn; M/s Lim Chee Wee Partnership
For the intervener - Eng Kar Wei; M/s Azim, Tunku Farik & Wong

Reported by Najib Tamby

A

JUDGMENT

Ong Chee Kwan JC:

Introduction

B **[1]** The plaintiff is a victim of a push payment fraud. Unknown fraudsters, being the first defendant, had deceived the plaintiff to pay the sum of EUR123,014.65 (equivalent to close to RM600,000) into a CIMB bank account under the control of the second defendant.

C **[2]** This court had granted orders for a proprietary and *Mareva* freezing injunction against the first and second defendants. The facts and the orders are reported in *Zschimmer & Schwarz GmbH & Co KG Chemische Fabriken v. Persons Unknown & Anor* [2021] 7 MLJ 178.

D **[3]** Orders for discovery against the banks were also subsequently granted. The documents from discovery revealed that the second defendant had immediately transferred out the plaintiff's monies. The money was shown to have been split three ways:

(i) The second defendant pocketed RM290,400;

(ii) The proposed third defendant pocketed RM250,000; and

E (iii) The proposed fourth defendant pocketed RM50,000.

[4] The plaintiff now seeks the following applications in the following sequence:

(i) Enclosure 53 – application to amend the writ and statement of claim to include the proposed third defendant and the proposed fourth defendant.

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(ii) Enclosure 56 – application for *ex parte* proprietary and *Mareva* freezing injunctions against the proposed third defendant and the proposed fourth defendant.

(iii) Enclosure 57 – an application for a self-identification order against the first defendant.

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(iv) Enclosure 58 – an application for substituted service of the amended writ and statement of claim, and the other cause papers, on the second defendant.

H

Background Facts

[5] The plaintiff, being Zschimmer & Schwarz GmbH & Co KG Chemische Fabriken, is a company incorporated under the laws of Germany. The plaintiff is a manufacturer of speciality chemical products. The plaintiff had been defrauded of EUR123,014.65 (equivalent to close to RM600,000) ('plaintiff's monies').

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[6] The first defendant, being persons unknown, is a defendant and/or a group of defendants, who are essentially recipients of the monies misappropriated from the plaintiff or perpetrators of the fraud (as defined and particularised in the statement of claim) whose identities are currently unknown.

[7] The second defendant, being Mohammad Azuwan bin Othman ('Mohammad Azuwan'), is a Malaysian citizen and trading under the name and style of Premier Outlook Services ('Premier Outlook'). The second defendant had received the plaintiff's monies in Premier Outlook's account. As will be further detailed below, the second defendant had then caused the plaintiff's monies to be paid out to other bank accounts, including the second defendant's own personal bank account.

[8] The proposed third defendant, being Ahmad Abdul Salam bin Ramlan ('Ahmad Abdul Salam'), is a Malaysian citizen and is also the former owner of Premier Outlook before being replaced by the second defendant.

[9] The proposed fourth defendant, being Amirul Syahiran bin Azahari ('Amirul Syahiran'), is a Malaysian citizen and trading under the name and style of Buraq Logistics Enterprise ('Buraq Logistics').

[10] Buraq Logistics is listed as a sole proprietorship carrying out a business of transportation services, provision of sports equipment and delivery of food and beverages. It commenced and registered its business on 12 January 2017, but its business license expired on 26 August 2019. Yet, as explained below, the second defendant had seemingly paid out part of the plaintiff's monies into Buraq Logistics' bank account for "exchange services".

[11] Where necessary, Ahmad Abdul Salam and Amirul Syahiran will be collectively referred to as 'the proposed third and fourth defendants' below.

The Fraud

[12] The full background facts of the fraud have been set out in *Zschimmer & Schwarz GmbH & Co KG Chemische Fabriken v. Persons Unknown & Anor* [2021] 7 MLJ 178. Only the key and relevant facts are repeated below.

[13] The plaintiff was a victim of a push payment fraud. The first defendant had infiltrated the email communications between the plaintiff and the plaintiff's South Korean counterpart. The first defendant subsequently deceived the plaintiff into making a payment of EUR123,014.65 (approximately close to RM600,000) into a CIMB bank account in Malaysia. The plaintiff thought it was making a genuine payment to its South Korean counterparty for the commission payment, however the fraudster had siphoned the monies away.

[14] On 30 October 2020, the plaintiff's monies were credited into Premier Outlook's CIMB bank account ('Premier Outlook's CIMB account').

[15] The plaintiff has since discovered that the second defendant is the sole signatory in control of this Premier Outlook CIMB account. On 30 October 2020, the second defendant caused all of the plaintiff's monies to be paid out to different bank accounts. These bank accounts include accounts of the proposed third and fourth defendants.

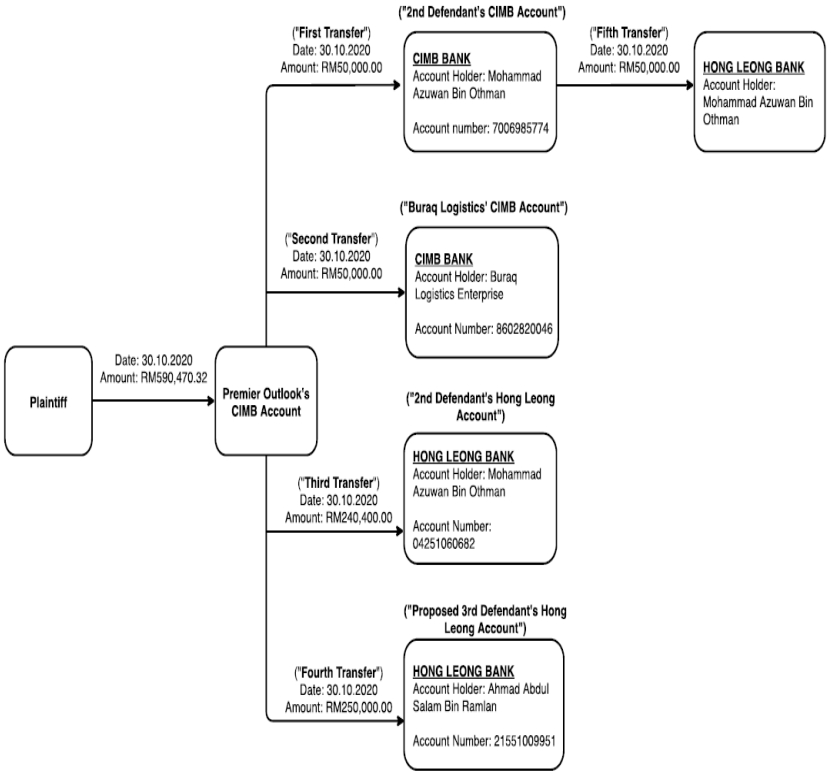
[16] On 8 December 2020, the plaintiff filed an urgent action against the first and second defendants. The plaintiff subsequently obtained a *Mareva* freezing injunction, a proprietary injunction and discovery orders against the first and second defendants in order to preserve, trace and recover the plaintiff's monies.

Discovery Of The Proposed Third And Fourth Defendants' Identities

[17] On 5 January 2021, the plaintiff's solicitors obtained a discovery order against CIMB Bank Berhad and CIMB Islamic Bank Berhad (collectively referred to as 'CIMB') ('discovery order') for documents regarding Premier Outlook's CIMB account ('discovery documents').

[18] On 19 January 2021, the plaintiff's solicitors obtained the discovery documents from CIMB's solicitors. The documents showed that on 30 October 2020 itself, the second defendant had transferred all of the plaintiff's monies, now being the Ringgit Malaysia sum of RM590,470.32, out of Premier Outlook's CIMB account to four different bank accounts.

[19] For ease of reference, the chart below demonstrates the money flow of the plaintiff's monies to the different bank accounts:



[20] The second defendant made the transfers above out of Premier Outlook's bank account with recipient references of "commission services" and "exchange services". But these could not have been actual business transactions since Premier Outlook was not carrying on any business.

[21] Next, shortly after making the first transfer, the second defendant again transferred the RM50,000 from the second defendant's CIMB account to what is believed to be the same second defendant's Hong Leong account.

[22] Therefore, based on the events above, the plaintiff has now discovered evidence of further dissipation of the plaintiff's monies and the identities of the recipients. The end result is that:

(i) The second defendant has pocketed RM290,400;

(ii) The proposed third defendant has pocketed RM250,000; and

(iii) The proposed fourth defendant has pocketed RM50,000.

[23] Based on the aforesaid, the plaintiff now seeks for the appropriate reliefs to trace and recover those monies under the various enclosures referred to above.

Enclosure 53 – Amendment And Addition Of Parties

[24] Pursuant to O. 20 r. 5 of the Rules of Court 2012 ('ROC 2012') the court may allow the plaintiff to amend his writ or pleading at any stage of the proceedings on terms and in a manner that the court thinks just.

[25] The Federal Court in *Yamaha Motor Co. Ltd v. Yamaha (M) Sdn. Bhd. & Ors* [1983] 1 CLJ 191; [1983] CLJ (Rep) 428; [1983] 1 MLJ 213 held that the general principle is that the court will allow amendments that cause no injustice to the other parties. To determine whether injustice would or would not result, the court will consider the following factors:

(i) whether the application is *bona fide*;

(ii) whether prejudice caused to the other side can be compensated by costs; and

(iii) whether the amendments would not in effect turn the suit from one character into a suit of another and inconsistent character.

[26] Further, as the plaintiff seeks to add additional defendants to this suit, O. 15 r. 6(2)(b) of the ROC 2012 provides that the court may order:

(i) any person who ought to have been joined as a party or whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or

(ii) any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which, in the opinion of the court, would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

[27] The above requirements have been met.

[28] First, the plaintiff has made this amendment application *bona fide* and without undue delay after receiving the discovery documents and ascertaining the identities of the proposed third and fourth defendants. It is necessary to add the proposed third and fourth defendants to this suit in order to seek the necessary reliefs to recover the plaintiff's monies.

[29] Second, no prejudice is caused to the first and second defendants by this amendment which cannot be compensated by costs. This amendment also does not change the nature of this suit. The plaintiff maintains its

constructive trust claim against the first and second defendants, and extends the same claim to the proposed third and fourth defendants who had each received a portion of the plaintiff's monies.

[30] Third, the proposed third and fourth defendants ought to be added as parties to the suit as they are necessary to ensure that all matters in dispute can be completely determined by the court as the plaintiff now claims that the plaintiff's monies have been wrongfully transferred to the proposed third and fourth defendants. The proposed third and fourth defendants are closely connected to the reliefs and remedies that the plaintiff is claiming in this suit.

Enclosure 56 – Grant Of A Proprietary Injunction

[31] A proprietary injunction is used to preserve and restrain a defendant from dealing with the assets of the plaintiff or with assets in which the plaintiff has an existing proprietary interest in.

[32] The plaintiff applies the principles set out in *Westdeutsche Landesbank Girozentrale v. Islington London Borough Council* [1996] AC 669 ('*Westdeutsche*') which held that when property is obtained by fraud, equity imposes a constructive trust on the fraudulent recipient. This is so that the property is recoverable and traceable in equity:

> I agree that the stolen moneys are traceable in equity. But the proprietary interest which equity is enforcing in such circumstances arises under a constructive, not a resulting, trust. Although it is difficult to find clear authority for the proposition, when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity. Thus, an infant who has obtained property by fraud is bound in equity to restore it: *Stocks v. Wilson* [1913] 2 KB 235, 244; *R. Leslie Ltd. v. Sheill* [1914] 3 KB 607. Moneys stolen from a bank account can be traced in equity: *Bankers Trust Co. v. Shapira* [1980] 1 WLR 1274, 1282C-E: see also *McCormick v. Grogan* (1869) LR 4 HL 82, 97.

[33] The English High Court decision of *AA v. Persons Unknown* [2020] 4 WLR 35 at [61]-[62] sets out the three elements for the grant of a proprietary injunction, which are:

(i) that the claimant has shown that there is a serious issue to be tried on the merits;

(ii) that the balance of convenience is in favour of granting an injunction; and

(iii) that it is just and convenient to grant the injunction.

[34] In my judgment, the plaintiff has satisfied the grounds for a proprietary injunction against the proposed third and fourth defendants.

A *(i) Serious Issue To Be Tried For Proprietary Injunction*

[35] The second defendant has wrongfully dissipated the plaintiff's monies by transferring them to different bank accounts, including accounts belonging to and/or controlled by the proposed third and fourth defendants. There is a serious issue to be tried for the plaintiff to recover those monies.

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[36] Dishonest assistance is claimed since the proposed third defendant was the original owner and founder of Premier Outlook. The evidence suggests that proposed third defendant then handed over ownership of Premier Outlook to the second defendant.

C **[37]** However, there is no evidence that Premier Outlook ever carried on any business. The premise at its registered business address is empty. There are serious questions regarding the proposed third defendant having dishonestly assisted in creating the Premier Outlook entity in order for it to be a vehicle to carry out the fraud.

D **[38]** Knowing receipt is also claimed against the proposed third defendant since part of the plaintiff's monies was transferred to the proposed third defendant.

[39] As regards the proposed fourth defendant, on 30 October 2020, the proposed fourth defendant had received the RM50,000 which is part of the E plaintiff's monies. There is a serious issue to be tried that the proposed fourth defendant knew that this RM50,000 was obtained through illegitimate means. It is unlikely for it to be a genuine business transaction since Buraq Logistics Enterprise's business licence had long expired since 28 June 2019.

F **[40]** Following *Westdeutsche*, the plaintiff asserts a constructive trust claim over the plaintiff's monies. As the plaintiff's monies can now be traced to the transfers made to the proposed third and fourth defendants, there are serious issues to be tried that the plaintiff's proprietary interest should be preserved by this proprietary injunction.

G *(ii) Balance Of Convenience In Favour Of Proprietary Injunction*

[41] The balance of convenience is in favour of the grant of the proprietary injunction. These are the plaintiff's monies that were paid out under a false premise and wrongfully transferred to the proposed third and fourth defendants. These monies should be injuncted pending the determination of H the full writ action.

(iii) Just And Convenient

[42] I agree with learned counsel for the plaintiff that in the circumstances above, it is just and convenient to grant the proprietary injunction.

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Grant Of A *Mareva* Freezing Injunction

[43] As set out by Mohamed Azmi SCJ in the Supreme Court case of *Aspatra Sdn Bhd & Ors v. Bank Bumiputra (M) Bhd & Anor* [1987] 2 CLJ 377; [1987] CLJ (Rep) 50; [1988] 1 MLJ 97, there are three elements for the grant of a *Mareva* freezing injunction:

(i) The applicant must show that it has a good arguable case;

(ii) That the defendants have assets within jurisdiction; and

(iii) That there is a risk of the assets being removed before judgment could be satisfied.

[44] Again, these elements have been satisfied.

(i) Good Arguable Case For Mareva Freezing Injunction

[45] There is a good arguable case that the plaintiff has a cause of action against the proposed third and fourth defendants on grounds of knowing receipt and/or dishonest assistance.

(ii) Assets Within The Jurisdiction

[46] The proposed third defendant is a Malaysian citizen with a Malaysian residential address. He has a Hong Leong bank account and RM250,000 of the plaintiff's monies was transferred into it. Therefore, he is likely to have assets in the jurisdiction, such as monies in his bank account.

[47] The proposed fourth defendant is a Malaysian citizen with a Malaysian residential address, and he is also the sole proprietor of Buraq Logistics. Therefore, he is likely to have assets in the jurisdiction personally and/or by virtue of his business.

(iii) Risk Of Dissipation Of Assets And Lack Of Probity

[48] The suspicious circumstances in relation to the transfer of plaintiff's monies to the bank accounts belonging to and/or controlled by the proposed third and fourth defendants disclose a real risk of dissipation of assets. There is also a lack of probity tainting these transactions. These suspicious circumstances include:

(i) On 30 October 2020, the second defendant had dissipated the plaintiff's monies almost instantaneously to four different bank accounts after the plaintiff's monies were transferred into Premier Outlook's bank account;

(ii) The third defendant is the former owner of Premier Outlook. He set up Premier Outlook before passing the company on to the second defendant. According to the plaintiff's investigation, Premier Outlook does not even exist at its registered business address and is likely a non-existent or non-functioning company. Further, the second defendant

transferred the RM250,000 from the plaintiff's monies to the proposed third defendant's Hong Leong account for questionable "commission services"; and

(iii) The fourth defendant's business, being Buraq Logistics, has ceased its business since 28 June 2019. Its business licence had expired. Yet, the second defendant transferred the RM50,000 from the plaintiff's monies into Buraq Logistics' CIMB account seemingly for "exchange services". It appears that this transaction is not *bona fide* and that there is a lack of probity.

[49] When assessing whether there is a risk of assets being removed, a lack of probity and honesty can be determinative in concluding that there is such a risk of dissipation as stated in the Court of Appeal decision in *Ang Chee Huat v. Thomas Joseph Engelbach* [1995] 2 CLJ 893; [1995] 2 MLJ 83.

[50] As the suspicious circumstances above show that the proposed third and fourth defendants are closely connected to the fraud, the proposed third and fourth defendants would not hesitate to preserve their self-interests by moving their assets out of reach once they have knowledge of these proceedings if they are not restrained by the *Mareva* injunction being sought.

Compliance With Order 29 Rule 1(2A) Of The Rules Of Court 2012

[51] The plaintiff has met the requirements under O. 29 r. 1(2A) of ROC 2012.

[52] In compliance with O. 29 r. 1(2A)(a) and (b), the affidavit in support sets out the facts giving rise to the claim and the injunctions application.

[53] In compliance with O. 29 r. 1(2A)(c), the reason why this application is fixed on an *ex parte* basis is because the proposed third and fourth defendants are likely to hide or dissipate assets, or become flight risks should notice of this application be given to them. Given the suspicious circumstances and the involvement of the proposed third and fourth defendants in the fraud, no notice of this application has been given to them.

[54] In compliance with O. 29 r. 1(2A)(d), the plaintiff has set out possible answers that may be asserted by the proposed third and fourth defendants and the plaintiff's responses:

Proposed Third Defendant

(i) The proposed third defendant may assert that the payment was made for a genuine business transaction made between him and Premier Outlook. However, Premier Outlook does not exist at its registered business address and appears to be a non-existent or non-functioning company. Therefore, it is highly unlikely for the proposed third defendant to have conducted any genuine business transactions with Premier Outlook.

Proposed Fourth Defendant

(i) The proposed fourth defendant may assert that the payment was made for a genuine business transaction made between Premier Outlook and Buraq Logistics. However, Premier Outlook does not exist at its registered business address and appears to be a non-existent or non-functioning company. In addition, Buraq Logistics had ceased carrying on any business by 28 June 2019 as its business registration had expired. Therefore, it is highly unlikely for Buraq Logistics to have conducted any genuine business transactions with Premier Outlook.

(ii) The proposed fourth defendant may further assert that he was unaware of the second transfer being made into Buraq Logistics' CIMB account. However, the proposed fourth defendant, being the sole proprietor of Buraq Logistics, must have had control and knowledge over the bank account at the material time of receipt of payment.

[55] The plaintiff also confirmed that there is no other similar application made to another judge.

[56] Finally, in compliance with O. 29 r. 1(2A)(g), the plaintiff has set out the precise reliefs in the affidavit in support and the notice of application for the *Mareva* and proprietary injunctions under encl. 56.

Enclosure 57 – Application For A Self-Identification Order

[57] Enclosure 57 is the plaintiff's application for a self-identification order, also known as a 'Spartacus' or 'I am Spartacus' order, against the first defendant – being persons unknown. A self-identification order is an order requiring the persons unknown to identify himself/herself and to provide an address for service.

[58] In the English High Court case of *PML v. Person(s) Unknown* [2018] EWHC 838 (QB) ('*PML*'), the purpose of the self-identification order is so that if the plaintiff were to succeed in its claim, such an order is necessary to ensure that the plaintiff's remedies are to be effective. In *PML*, unknown hackers had hacked and stolen a large amount of data. The unknown hackers then blackmailed the plaintiff to pay money in order for the data to be returned. The court granted a self-identification order against the unknown hacker defendants and Justice Nicklin explained at [17]:

> 17. ... Such an order is necessary if, in the event of success in the claim, the remedies to which the claimant would be entitled are to be effective. Of course, a defendant may disobey and not comply with a self-identification order as well as the non-disclosure order. But it cannot be assumed that all defendants will choose defiance. Few defendants can remain confident that they will ultimately manage to evade identification. If they fail, punishment for contempt of court would then loom large.

[59] The court also went on to explain that in another case of *NPV v. QEL & Another* [2018] EWHC 703 (QB) also involving an anonymous blackmail case, the self-identification order was made against the anonymous second defendant. The second defendant complied with the order and provided his name and address for service.

[60] In *CMOC Sales & Marketing Limited v. Persons Unknown and 30 Others* [2018] EWHC 2230 (Comm), the court had also observed that the courts often granted self-identification orders against unidentified defendants at [185] and [186]:

> 185. Finally, I note that in the Media and Communications list of the Queen's Bench Division, it's not uncommon to have injunctions granted against persons unknown who have been involved in gaining unauthorised access to claimants' IT systems and thus their data. They then obtain a substantial amount of information which they threaten to publicise unless they were paid a ransom ...
>
> 186. Indeed, in that list the court often grants self-identification orders requiring the unidentified defendant to identify themselves and provide an address for service.

[61] In this case, the self-identification order would require placement of an advertisement in Berita Harian of a notice against the first defendant (being the persons unknown). The notice would alert the persons unknown of the order for them to self-identify within seven days of the advertisement and failing which, they risk committal proceedings.

[62] In this case, the web of potential defendants is growing wider. Originally, the second defendant was the recipient of the plaintiff's monies. Next, the money trail has led to the proposed third and fourth defendants. The self-identification order is necessary so that if the plaintiff is successful in its current suit, the plaintiff's proprietary remedies are to be effective against these other persons unknown. The plaintiff's monies also appear to remain within Malaysian bank accounts and Malaysian jurisdiction. Hence, the self-identification advertisement in Malaysia can be effective to alerting the persons unknown to reveal themselves.

[63] Although the cases granting a self-identification order cited involved blackmailing and threat of publication of confidential or sensitive information, I find the principles equally applicable in the present circumstances which involved fraud and persons hiding behind the fraud.

Enclosure 58 – Substituted Service On The Second Defendant

[64] Order 62 r. 5(1) of the ROC 2012 provides that the court may make an order for substituted service of a document requiring personal service if personal service is impracticable.

[65] At present, the plaintiff is filing fresh interlocutory applications to, among others, amend the writ and statement of claim to add the proposed third and fourth defendants as additional parties to this suit. It is therefore necessary for the plaintiff to serve these relevant cause papers on the second defendant. Nonetheless, it is impractical to effect personal service of the cause papers on the second defendant for the reasons below.

[66] On 23 December 2020, the plaintiff filed an application for substituted service on the second defendant by way of advertisement and by leaving a copy of the cause papers at the second defendant's last known address.

[67] As stated in the affidavit in support of the application, the second defendant had been in contact with the plaintiff's solicitors and was aware of the current proceedings against him. Despite having scheduled multiple appointments with the plaintiff's solicitors for the service of the cause papers, the second defendant failed to turn up on all occasions and told the plaintiff that he had left the State for work.

[68] On 29 December 2020, the plaintiff obtained an order for substituted service on the second defendant. The cause papers were then duly advertised and left at the second defendant's address at No. 27, Jalan 9, Taman Sri Indah, 45600 Bestari Jaya, Selangor, Malaysia.

[69] To date, more than a month has lapsed since the deemed date of service of the relevant cause papers on the second defendant. However, the second defendant has refused to enter appearance or make any form of contact with the plaintiff's solicitors.

[70] The Singapore High Court in *BNP Paribas (aka Banque National De Paris) v. Polynesia Timber Services Pte Ltd* [2002] 1 SLR(R) 539 held that substitution of service may be ordered if circumstances are such as to render personal service, within or out of the jurisdiction impracticable, for the defendant avoids such service. The inference is made when evidence shows that the defendant was unavailable because he knew that an action was being taken against him.

[71] Given the circumstances above, the second defendant is likely to be evading service after being aware of this suit against him. Therefore, this application for substituted service should be allowed as it would be impractical for the plaintiff to effect personal service of the cause papers. Further, the second defendant would not be prejudiced by the substituted service as he already has knowledge of this suit.

Conclusion

[72] Accordingly, this court grants to the plaintiff an order in terms of the prayers set out in encl. 5 which seeks an order in terms of the encls. 53, 56, 57 and 58.